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NOTES ON RECENT MISSOURI CASES

BILLS AND NOTES—LIABILITY OF ANOMALOUS INDORSER UNDER THE NEGOTIABLE INSTRUMENTS LAW. *Overland Auto Co. v. Winters.*¹ This case raises the much discussed questions as to the liability of a person who places his name on the back of a note prior to or at the time of delivery. A and B, associates in business, contracted to purchase an auto to be used in their business from C, the agent of the plaintiff company. In payment C took a note payable to himself, signed by A as maker and indorsed on the back by B prior to delivery. The note read, "We promise to pay." Plaintiff having failed to aver presentment and notice so as to charge B as an indorser contended that he was liable as maker. The majority of the Kansas City Court of Appeals held that under the Negotiable Instruments Law,² such a party is deemed an indorser and that no evidence is receivable to show that he intended to bind himself in any other capacity. In a dissenting opinion, ELLISON, P. J., expressed a doubt as to this proposition, sug-

1. (1915) 180 S. W. 560. This case has been commented on in 29 Harvard Law Review 549 and in 25 Yale Law Journal 411.

2. Revised Statutes 1909, §§ 10033, 10034.

gesting that the ambiguity created by the word "we" in the promise might justify the introduction of extrinsic evidence to show that such party was not one of that class of persons whose liability is fixed by the act, namely, those signing "otherwise than as maker" or those "not otherwise a party to the instrument."

Prior to the Negotiable Instruments Law, there existed a great diversity of decisions as to this question, and it was the evident purpose of the framers of the act in the enactment of sections 10033 and 10034³ to fix the liability of such a party beyond dispute. In a majority of the cases arising under the law, these sections have been held to fix the anomalous indorser's liability as that of indorser and to preclude the introduction of any extrinsic evidence to vary that liability.⁴ The act, however, has not been unanimously so construed. A few cases hold that only a *prima facie* liability as indorser is created, which may be explained away by parol evidence.⁵

How far do ambiguities upon the face of the instrument justify a resort to parol evidence? Admitting that a person has signed "otherwise than as maker" the act settles the question, for such a person's liability can be other than that of indorser only in case he "clearly indicates by appropriate words his intention to be bound in some other capacity." But by what means is it to be determined whether a person has signed otherwise than as maker? Does the act refer to persons who intend to sign in another capacity than that of maker irrespective of the place of signature, or does it refer to persons who place their signatures in other than the usual place for the maker's signature? If the class is determined by the intention and that intention be ascertainable by extrinsic evidence, the purpose of the act is defeated. But if, tho a person signs in the usual place for an indorser's signature, there appears something upon the face of the instrument which indicates that his liability was intended to be that of maker, it might be contended that extrinsic evidence should be resorted to. Such a contention might not be without merit were section 10033 alone to be considered. But section 10034 is more definite as to the class affected by it, applying to "a person,, not otherwise a party to an instrument" who "places his signature thereon in blank before delivery." Viewing the two sections together in the light of the

3. The corresponding sections of the Uniform Negotiable Instruments Law are §§ 63, 64.

4. *Rockfield v. First National Bank* (1907) 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; *Gibbs v. Guaraglia* (1907) 75 N. J. Law, 168, 67 Atl. 81; *McDonald v. Luckendach* (1909) 170 Fed. 434; *Mechanics etc. Bank v. Katterjohn* (1910) 137 Ky. 427, 125 S. W. 1071. See collection of cases in Brannan, Negotiable Instruments Law, p. 77.

5. *Kohn v. Consolidated etc. Co.* (1900) 63 N. Y. Supp. 265 (semble); *Mercantile Bank v. Busby* (1908) 120 Tenn. 652, 113 S. W. 390; *Haddock, Blanchard & Co. v. Haddock* (1908) 192 N. Y. 499, 85 N. E. 682.

circumstances which led to the adoption of these provisions of the act, it seems preferable to hold that the act fixes the anomalous indorser's liability as that of indorser in all cases where it does not appear clearly from the instrument itself that he was intended to be bound in another capacity. This proposition is greatly strengthened, if indeed it is not established beyond controversy, by section 9988 which provides that "where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser." The effect of this section seems not to have been considered by either the majority or the dissenting judge.⁶

Conceding that under the facts of the principal case B was liable as an indorser, is he such an indorser as may claim presentment and notice? It is difficult to see how the holder can be relieved of the duty to give notice of dishonor by virtue of section 10085 on the theory that A was an accommodation maker. An accommodation party is defined by section 10000 as one who signs "without receiving value therefor." A can hardly be brought within this definition since he and B together received the consideration for the note. If it be accurate to say that as to the interest which B received in the property A is an accommodation maker, the consequence must inevitably follow that with respect to the interest which A received in the property, B is an accommodation indorser. Under this theory B would be at the same time both an accommodation and an accommodated indorser, in the one capacity entitled and in the other not entitled to claim demand and notice.

There has been considerable controversy as to the proper interpretation of section 10000 (section 29 of the uniform act).⁷ Probably the better view is that "without receiving value therefor" means *without receiving any value for the bill* and not *without receiving any consideration for lending his name*.⁸ Even under this construction, the one most favorable to the plaintiff in the principal case, A would not be an accommodation maker since he received value from the payee for the bill, and not merely a consideration for lending his name.

These considerations seem to impel the conclusion of the majority of the court that B was an indorser and as such entitled to both presentment and notice.

DEAN H. LEOPARD

6. Section 9988, paragraph 6, imposing a joint and several liability upon two or more persons who sign an instrument containing the words "I promise to pay," suggests a danger of attaching too much importance to the number of the subject of the promise.

7. See Brannan, *Negotiable Instruments Law*, p. 162 *et seq.*, for an account of the Ames-Brewster controversy on this point.

8. *Morris County Brick Co. v. Austin* (1910) 79 N. J. Law 273, 75 Atl. 550.

COURTS—CONFUSION IN MISSOURI SYSTEM OF APPELLATE COURTS. *Rourke v. Holmes St. Ry. Co.*¹ The defendant constructed a street railway in Kansas City between March, 1899 and July, 1900. On September 24, 1904, the plaintiff began suit for \$35,000 damages for injury alleged to have been caused to his property by the construction and operation of the railway. On April 25, 1906, the defendant had judgment and on September 13, 1906, the plaintiff appealed the case to the Supreme Court which on May 31, 1909 reversed the judgment and remanded the cause for a new trial because of error committed at the trial.² At the second trial in October, 1910 the plaintiff had judgment for \$5000. On June 7, 1911 the defendant appealed to the Kansas City Court of Appeals which on June 3, 1912 transferred the case to the Supreme Court under the statute of 1911.³ The case was argued before the Supreme Court *en banc* on April 28, 1913, and in an opinion delivered on April 2, 1914 it was transferred back to the Kansas City Court of Appeals on the ground that the statute in question was unconstitutional.⁴ This opinion was by a court divided four to three. On June 14, 1915, the Kansas City Court of Appeals rendered an opinion again transferring the cause to the Supreme Court on the ground that it involved a constitutional question which had not been considered by the Supreme Court on the previous transfer.⁵ On November 4, 1915, the case was again argued before the Supreme Court *en banc* and on December 8, 1915, it was again transferred back to the Kansas City Court of Appeals on the ground that no interpretation of the Constitution was necessary to a decision.⁶ On May 1, 1916 the Kansas City Court of Appeals reversed the judgment and remanded the case for a new trial.

This history is reviewed because of its bearing on the defects in the organization of Missouri courts. The case is not typical, and it is not often that litigation is so prolonged or that such confusion exists between courts; but it is not the only case in which such confusion has existed.⁷ It is a sufficient indictment of the system that such a bandying of a case should be possible. This fault is not the courts'—it is inherent in the Missouri system of court organization. It is bad enough that the plaintiff should be made to wait so many years and

1. (1915) 181 S. W. 76.

2. (1909) 221 Mo. 46, 119 S. W. 1094. The case was heard by Division One of the Supreme Court, LAMM, WOODSON and GRAVES, JJ., being present.

3. (1912) 166 Mo. App. 207. In 1909 the jurisdiction of the Courts of Appeals was enlarged from \$4500 to \$7500. Laws of 1909, p. 397, Revised Statutes 1909, § 3937. In 1911, the act enlarging the jurisdiction was amended by adding "that the Supreme Court shall retain and have full exclusive appellate jurisdiction in any case pending in which the Supreme Court has made any decision or ruling." Laws of 1911, p. 190.

4. (1914) 257 Mo. 555, 166 S. W. 272. A rehearing was denied on April 13, 1914.

5. (1915) 177 S. W. 1102. A rehearing was denied on July 2, 1915.

6. (1915) 181 S. W. 77.

7. See for instance, *Smith v. Glynn* (1912) 144 S. W. 149, (1915) 177 S. W. 848, (1916) 183 S. W. 681.

to conduct such expensive litigation to get the redress to which he may be entitled; but it is difficult to justify his being sent four times to another court to get his relief. And the end is not yet! It is still possible that the case may again be taken to the Kansas City Court of Appeals and on to the Supreme Court.

But there are more serious results than possible injustice to this particular plaintiff. Such confusion tends to undermine the confidence of the public in the whole judicial system; it entails a serious congestion of dockets when so much of the courts' time must be consumed in deciding questions of jurisdiction among themselves; it spells a waste of the courts' time and the state's money in the determination of problems which in a simpler system would be non-existent; in short, it is to some degree responsible for the existing situation in the appellate courts, all of which are overworked and two of which are notoriously behind their dockets.

Can a simpler system be devised? In 1913, the Missouri Bar Association adopted a resolution looking toward the merger of the Courts of Appeals and the Supreme Court and the organization of new divisions of the latter.⁸ A unified system of appellate courts would make impossible such a history as that of *Rourke v. Holmes St. Ry. Co.*, and it would mean a large measure of relief from the congestion and delays and consequent injustices in the present system.

MANLEY O. HUDSON

ESTATES—IMPLICATION OF REMAINDERS—ALIENABILITY OF CONTINGENT REMAINDERS—ENLARGEMENT OF ESTATES. *Faris v. Ewing*¹—A testator devised certain land to his son John and his daughter Mollie, under the express conditions "that neither of these devisees having any children and that if either dies leaving no living child the other shall inherit the entire land and if both shall die leaving no child or children then said lands shall revert to my estate and be divided amongst my other living children or if dead their children if any living, said lands cannot be sold by said devisees, except for life of either or the survivor but if they or either of them shall have any living children then said lands shall be an absolute gift." John later married and died leaving the plaintiff his only child; Mollie still lives childless. After the birth of the plaintiff, John and Mollie attempted to convey the land and the defendant claims under this conveyance. The court was unable to agree on the construction to be put on the will. WALKER and GRAVES, JJ., thought that John and Mollie took the fee which could be aliened after the birth of a child to either; they therefore denied any interest to the plaintiff and

8. 1913 Proceedings of Missouri Bar Association, p. 27 *et seq.*

1. (1916) 183 S. W. 280.

wanted to declare the defendant owner of the entire land. WOODSON and BLAIR, JJ., thought that John and Mollie took only life estates, with an implied contingent remainder as to the share of each in its child or children, and an alternate contingent remainder limited on the death of either without a living child to the other; they concluded that the plaintiff was invested with the fee to that half given to her father, and a contingent remainder in fee in Mollie's half. BOND and FARIS, JJ., thought that each took a life estate which upon the birth of a child to one was to become a fee in that one, and subject to this possibility each took a contingent remainder in the land of the other; they seem to have concluded that the plaintiff was entitled to no interest in the half devised to her father, since it had passed by his conveyance, but that she was entitled to a contingent remainder in fee in the half devised to Mollie. The *per curiam* opinion, analysed elsewhere in this number of the Law Series, purported to be a compromise giving half of the land to the defendant; whether the plaintiff took the other half is not clear, tho as a result of the opinions the plaintiff was entitled to only a contingent remainder in a half.

The language of this will is so rare and so confused that the case is of little value as a precedent of interpretation. Comment on the construction would be profitless therefore. But some phases of the case seem to merit attention, *viz.*, the implication of remainders, the apparent oversight of the alienability of contingent remainders, and the enlargement of estates.

Two of the judges, WOODSON and BLAIR, who thought that life estates were conferred on the first devisees, were willing to imply remainders in their children. They read the gift to be to John and Mollie for life, and if either dies without a child or children living at his death, then his half should go to the other. So read, the case goes far in implying a remainder to the child or children. The implication of estates tail where there is a devise to A for life or in fee with a gift over on his death without issue, is familiar enough.² Since the statute making failures of issue definite, this implication has been discontinued;³ the implication depended on an indefinite failure of issue and probably had its origin in an effort to escape the rule against perpetuities. To justify an implied gift to the child when there is a devise to A for life and a gift over if A dies without a surviving child, there should be a clear intention that the child is to take. In the principal case, WOODSON and BLAIR, JJ., seemed to assume this intention. They took for granted a desire of the testator to preserve the land to the donees and their children. WALKER and GRAVES, JJ., ex-

2. See an article on Estates Tail In Missouri, in 1 Law Series, Missouri Bulletin, 9. See also, Theobald, Wills (5th ed.) p. 642.

3. *Yocum v. Siler* (1900) 160 Mo. 281; *Gannon v. Albright* (1904) 183 Mo. 238.

pressly refused to imply a gift to the donees' children, relying chiefly on the fact that the first donees were not limited to life estates. Of course express estates will never be cut short by the implication of other estates, for the chief purpose of the implication is to supply a hiatus.⁴ In view of the fact that there has been so little discussion in the Missouri reports of the implication of remainders, it is to be regretted that the point did not receive more attention in *Faris v. Ewing*.

Four of the judges, WOODSON, BLAIR, BOND, and FARIS, seem to have concluded that John had a contingent remainder in Mollie's undivided half of the land and the *per curiam* opinion seems to have at least left it open to the plaintiff as heir of John to claim a remainder in this half.⁵ But this quite overlooks the fact that if John had a contingent remainder it passed to the trustee by his conveyance and from the trustee to the defendant. The possibility of conveying a contingent remainder is now settled in Missouri. Tho not alienable at common law,⁶ it was included in the statute of 1865 which provided for conveying "any estate or interest" in land by deed.⁷ If John had a contingent remainder in Mollie's undivided half, it passed by his deed tho the contingency should not occur until after his death. The will made no express gift of Mollie's half to the child of John. It is submitted that the four judges who apparently gave the plaintiff John's contingent remainder in Mollie's half, overlooked this point. But their conclusion also necessitated saying that the contingent remainder given to John by the will could descend to the plaintiff as his heir. No sound reason is perceived why a contingent remainder should not be a descendible interest in cases where the survivorship of the remainderman is not a part of the contingency; but numerous statements may be found in the Missouri reports to the effect that contingent remainders are not descendible.⁸ The judges in *Faris v. Ewing* seemed to assume that a contingent remainder is descendible, but *Hauser v. Murray*⁹ seems to be clearly *contra* and *Faris v. Ewing* cannot be taken to have overruled it. It seems clear that four of the judges overlooked both the alienability and the non-descendibility of the plaintiff's father's contingent remainder in the undivided half devised to the defendant's wife, and that if these had been perceived the result as to that part of the land should have been otherwise.

4. 1 Jarman, Wills (6th ed.) p. 669.

5. The effect of the *per curiam* opinion has been analysed in another comment on this case. Post, p. 58.

6. Fearn, Contingent Remainders, p. 365.

7. Revised Statutes 1865, c. 109, § 1, Revised Statutes 1909, § 2787; *Godman v. Simmons* (1893) 113 Mo. 122; *Summet v. Realty Co.* (1907) 208 Mo. 501. See 8 Law Series, Missouri Bulletin, p. 15.

8. *Delassus v. Gatewood* (1880) 71 Mo. 371; *Payne v. Payne* (1893) 119 Mo. 174; *Hauser v. Murray* (1913) 256 Mo. 58, 97. See also *Dickerson v. Dickerson* (1907) 211 Mo. 483; *Sullivan v. Garesche* (1910) 229 Mo. 496.

9. (1913) 256 Mo. 58.

One further point seems worthy of comment. BOND and FARIS, JJ., thought that John and Mollie each took an estate for life, subject to be enlarged into a fee by the birth of a child. What is this process of enlargement? The common law gave definite rules which, once the intention is ascertained, can be so applied as to enable one to say exactly what estates exist in particular land at any time. By the law of merger two estates in the same land vested in the same person at the same time may be so joined that the present would be swallowed up into the future estate, and since it is one of the requisites of a merger that the expectant estate should be at least as large in legal contemplation as the present estate, merger may without impropriety be spoken of as a process of enlargement. There is also the enlargement of estates on condition as first explained in *Lord Stafford's Case*,¹⁰ in such instances as where a testator devised land to A for life on condition that if A performed a certain condition he should have the fee. A takes a life estate which is said to be subject to enlargement on condition. Some commentators write of this as tho A took an estate for life with a contingent remainder in fee and as tho the enlargement occurred by merger when the remainder vested; but the result of *Lord Stafford's Case* cannot be so explained inasmuch as the particular estate was a fee tail which could not be merged into a fee simple. This enlargement must be something more than merger therefore.¹¹ Lord Coke required four incidents for an estate subject to enlargement: (1) a particular estate; (2) a continuance of this particular estate in the grantee until the increase happens; (3) the immediate vesting of the increase on the happening of the condition; (4) the particular estate and the increase ought to take effect by one and the same instrument or by several instruments delivered at the same time. These incidents are stated as necessary, also, by Fearn, ¹² by Cruise,¹³ and by Sheppard¹⁴ who adds a fifth incident, viz., that the condition must be lawful.

Such enlargement of estates, while recognized by Coke,¹⁵ Fearn, Smith, Cruise, Sheppard, Preston,¹⁶ and seemingly Sugden,¹⁷ has apparently not been noticed by more recent writers such as Williams, Leake, Challis, Gray, Washburn and Tiffany. It seems not to have

10. (1609) 8 Coke 146.

11. The distinction between a limitation enlarging an estate and a remainder is sharply drawn in Smith, *Executory Limitations*, § 163.

12. Fearn, *Contingent Remainders*, p. 279.

13. Cruise, *Digest*, 283.

14. Sheppard, *Touchstone*, p. 128.

15. See Coke, *Littleton*, 217b.

16. 2 Preston, *Abstracts*, 188.

17. Sugden's reference is quite bare. 1 Sugden, *Powers* (3d Amer. ed.)

89. See also 2 Blackstone, *Commentaries* (Lewis' ed.) 152.

been recognized by the Missouri court until *Sheppard v. Fisher*.¹⁸ The principle is now applied by BOND and FARIS, JJ., in *Faris v. Ewing*, but without any clear enunciation of it; but accepting the construction put on the will by these judges, the principle cannot be applied to both of the undivided halves, if the incidents as required by Lord Coke still obtain. Lord Coke required that the devisee of the particular estate to be enlarged should keep it until after the increase actually occurred, in order to preserve the privity between the testator and devisee. In *Faris v. Ewing*, John continued to hold his life estate until after the birth of the plaintiff, so that this incident was fulfilled; but Mollie conveyed before any child was born with the result that her life estate cannot be enlarged into a fee thereafter, if the dictum of Lord Coke, approved by Fearne, Cruise, Preston and Sheppard is to be followed. Privity was required because of the nature of conveyancing at common law. If this requirement is to be abandoned it must be justified by the change in the methods of conveyance.

But if the Missouri court is to apply this principle of enlarging estates it owes it to the profession to clearly define it. Is it the common law principle applied by Lord Coke in *Lord Stafford's Case*, or is it some new principle? If a particular estate is liable to be enlarged, may it be followed by a vested remainder? Or must any limitation thereafter be contingent? These questions cannot be answered from the Missouri cases and authorities elsewhere are very meager.

MANLEY O. HUDSON

ESTATES—LIFE ESTATE OR FEE SIMPLE—VALIDITY OF EXECUTORY LIMITATION AFTER A FEE. *Middleton v. Dudding*¹—This case involved the construction of a devise of land to the testator's wife Annie "as her absolute property", with a proviso in the codicil that "should Annie die without a will or having disposed of the property" it should go over to the plaintiffs in the action. Annie died intestate and without having disposed of the land. In Division One, RAILEY, C., was of the opinion that Annie took a life estate with power of disposal of the fee by will or deed, and that the gift over took effect as a remainder; but this view was not taken by the court which in an opinion by BOND, J., held that Annie took the fee, that the words in the codicil were not strong enough to cut it down, and that the gift over on a failure to exercise the power of disposal was void. This view was taken by all of the court *en banc* except Woodson, C. J.,

18. (1907) 206 Mo. 208. For a criticism of *Sheppard v. Fisher*, see 3 Law Series, Missouri Bulletin, p. 14; 11 Law Series, Missouri Bulletin, p. 21. In the latter comment, in note 84, it is erroneously stated that the enlargement of estates as described by Coke seems to have been no more than an application of the law of merger.

1. (1916) 183 S. W. 443.

who approved the opinion of RAILEY, C., and went much further in the application of the statute directing courts "concerned in the execution of will" to have due regard to testators' intent and directions.²

In the last number of the Law Series the writer attempted a complete survey of the subject of executory limitations in Missouri law and made a special study of limitations after a fee in the event of a non-exercise of an added power of disposal. The protest there made against the principle that any limitation after a fee simple with added power of disposal is void, has been more than justified by the principal case; and the bad effect of that principle in causing such division on the question of whether the first taker has a fee or a life estate is nowhere better exemplified. It is most unfortunate that the court applied the principle in this case, without any clear statement of it and without any discussion of the reason for it.

If the testator's wife took a life estate under the will the gift over is of a valid remainder; if she took a fee the gift over is void as a remainder because of the impossibility of limiting a remainder after a fee, and void as an executory devise because of the indefensible rule noted above and applied by the Missouri court in *Green v. Sutton*,³ *Cornwell v. Wulff*,⁴ and *Roth v. Rauschenbusch*.⁵ The whole contest raged around the preliminary question whether a life estate or a fee simple was conferred on the first taker. Since the decision of *Walton v. Drumtra*,⁶ overruling *Cornwell v. Wulff*,⁷ and the opinion in *Gibson v. Gibson*,⁸ it should have been supposed that every effort would be made to find that a life estate had been conferred on the first taker in order to escape the frustration of intention consequent on the application of the principle that if the first taker is given a fee with added power of disposal the gift over is void. The opinion of RAILEY, C., justified this expectation. But the opinion of BOND, J., revives the uncertainty prevailing at the time the Cornwell cases were decided, and it seems clear that the court will not longer shrink from finding that the first taker has a fee even tho it involves the invalidity of the gift over. But this ought to be more clearly stated by the court, which owes it to the profession to give some justification for the principle which it has here applied without even so much as a statement of it.

Some passages in the opinion of BOND, J., are indeed surprising. For instance, "The unlimited power to convey or will away property are the essential attributes of an estate in fee. To concede the right

2. Revised Statutes 1909, § 583, first enacted in 1815, 1 Missouri Territorial Laws, p. 411.

3. (1872) 50 Mo. 186.

4. (1898) 148 Mo. 542. See also *Cornwell v. Orton* (1894) 126 Mo. 355.

5. (1903) 173 Mo. 582. See also *Young v. Robinson* (1906) 122 Mo. App. 187.

6. (1899) 152 Mo. 489.

7. (1898) 148 Mo. 542.

8. (1911) 239 Mo. 490.

in a grantee to exercise these functions is to concede a fee simple in such grantee." Surely these words cannot be read literally for it has so often been held that the addition of a power of disposal does not convert a life estate into a fee,⁹ that it would now seem beyond question. Again, Judge BOND says that the testator "attempted to make a double devise of the fee. It is too clear for elaboration that this can never be done." This amounts to saying that no executory limitation after a fee is valid, whether by way or springing or shifting use. The writer has attempted to show in the last number of the Law Series¹⁰ that executory limitations following fees simple have a secure place in Missouri law since *Sullivan v. Garesche*¹¹ and certainly springing executory interests are secure since *O'Day v. Meadows*.¹² The dicta in *Simmons v. Cabanne*¹³ are out of consonance with all the modern cases. Judge BOND himself in *Brown v. Tuschoff*¹⁴ in *Buckner v. Buckner*¹⁵ recognized the validity of executory limitations after fees simple. Judge WOODSON pointed out this error of Judge BOND's by saying that "even at common law, under the doctrine of contingent remainders, executory devises and springing and shifting uses, a fee upon a fee, or any lesser estate, could be granted thereafter." But it is submitted that this, too, is error, if it means that a contingent remainder can be limited after a fee.

Another suggestion of Judge Woodson's is pregnant with interesting consequences. He says that the statute¹⁶ was "designed to do away with the necessity of resorting to the children of executory devices [devises] and springing and shifting uses in order to cut down a fee given to the first devisee and to give a remainder over upon the happening of a contingency stated in the will cutting down the fee in the first taker." The position seems to be that the statute enjoining regard to the testator's intention in the execution of a will abrogated all rules of law which might defeat intention. This would afford relief from the artificial rule that a fee with added power of disposal cannot be followed by a gift over, and such relief may in some future decision come this way. Some passages in *Gibson v. Gibson*¹⁷ seem to indicate the same idea. But such a construction of the statute was not hinted at in the century of its application,¹⁸ until *Gibson v. Gibson*. And if the construction be sound, it would have enabled

9. *Gregory v. Cowgill* (1854) 19 Mo. 415; *Lewis v. Pitman* 101 Mo. 281; *Garland v. Smith* (1901) 164 Mo. 1.

10. 11 Law Series, Missouri Bulletin 3.

11. (1910) 229 Mo. 496.

12. (1905) 194 Mo. 588.

13. (1903) 177 Mo. 336.

14. (1911) 235 Mo. 449.

15. (1913) 255 Mo. 371.

16. The Chief Justice seems to have been referring to Revised Statutes 1909, § 579, but he must have had in mind § 583.

17. (1911) 239 Mo. 490.

18. Revised Statutes 1909, § 583 was first enacted in 1815.

the courts to abandon the rule in *Shelley's Case* and the common law meaning of "die without issue" without statutory authority. It may well be argued that it would also have abrogated the rule against perpetuities. The statute was first enacted in 1815, one year before the adoption of the common law in Missouri, and it would seem that such a general enactment concerning testators' intentions should not prevent the recognition of well defined principles even tho they may defeat testators' intentions, such as the rule against perpetuities for instance. Judge Woodson's position would mean that any future limitation is to be effectuated and that the statute has abolished all differences between contingent remainders and executory devises. Tho *Buckner v. Buckner* seems to give color of soundness to this position, it seems improbable that such a revolution has been actually effected.

Counsel in *Middleton v. Dudding* made the mistake of not contending for an abandonment of the rule that any limitation after a fee with added power of disposal is void, as applied in *Green v. Sutton*, *Cornwell v. Wulff* and apparently in *Roth v. Rauschenbusch*.¹⁹ Until that rule is abandoned, there can be no end to the litigation on the question whether the first taker has a life estate or a fee. *Middleton v. Dudding* revives the uncertainty which since *Walton v. Drumtra* and *Gibson v. Gibson* was diminishing. No one should be content with any opinion on such a will as that involved in *Middleton v. Dudding* until the highest court has expressed itself—it seems really a situation for the last guess of the Supreme Court, for it must be admitted that since most testators will not stop to weigh these niceties it is the supposed and not the actual intention which is to be found. Every such will must therefore be taken to the Supreme Court, with the result of further congesting its already overcrowded docket. This must continue until the abandonment of a rule for which no attempt at justification has been made in the numerous opinions dealing with it.

MANLEY O. HUDSON

FIXTURES—EFFECT OF ANNEXATION BY LESSOR FOR USE OF LESSEE. *Cunningham v. Von Mayes*¹—The federal government leased a store building in Caruthersville for ten years for use as a post office. In compliance with a stipulation in the lease, the lessor equipped the building with post-office furniture and cabinets and tables. Some of the cabinets were fastened to the ceiling by braces and to the floor by nails and screws and served as a partition between the space in which the mail was worked and the part which was open to the public. A judgment creditor of the lessor caused execution to be levied on the realty and it was sold to the plaintiff, subject to the lessee's term;

19. For the basis for such a contention, see 11 Law Series, Missouri Bulletin, p. 37 *et seq.*

1. (1916) 182 S. W. 1059.

another judgment creditor caused execution to be levied on the post office furniture and fixtures as the personal property of the lessor and they were about to be sold when the plaintiff filed his bill against the sheriff and the execution creditor to enjoin such sale. The Springfield Court of Appeals affirmed the trial court's refusal to enjoin the sale, on the ground that the post office fixtures had not become a part of the realty but had retained their character as personalty.

The Missouri courts have frequently approved the three-fold test for determining whether a chattel has become a fixture: (1) actual annexation to the realty or something appurtenant thereto; (2) adaptability to the use of the realty to which it is annexed; (3) intention that the annexed chattel shall be a permanent accession to the land, such intention "being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation and the purpose, the use for which the annexation has been made." This test was applied in the leading Missouri case of *Rogers v. Crow*,² in which an organ affixed by only a few nails to the floor of an alcove in a church was held to be a part of the realty.

Applying this test to the present case it would seem that the articles were actually annexed to the realty; that they were adapted to the uses of the realty; and that an intention of permanency can be reasonably inferred. The suggestion of the court that the annexation might have been for the purpose of steadying the cabinets seems untenable in view of the fact that post offices generally follow this plan to secure greater convenience for the delivery of mail and also to give security and protection to the mail and articles of value within the distributing room; the annexation was also to secure permanency to the cabinets as a partition. In *Williams v. Lane*³ shelves put in a building used by a tenant as a store room, passed to the vendee as fixtures. In *Cohen v. Kyler*,⁴ a bath tub and two sinks nailed to the floor and walls were sufficiently annexed to be fixtures; so in *Sosmon v. Conlon*,⁵ stage scenery and fittings of standard size, hung by pulleys and ropes, which could be used in any standard theater. In *Thomas v. Davis*,⁶ HENRY, J., stated that "annexation must be permanent, tho slight, and it need not be such that if severed, such severance will involve the destruction, impairment or substantial injury of the freehold." Following that, the annexation by means of screws

2. (1867) 40 Mo. 91. See the comment on *American Clay Machinery Co. v. Sedalia Brick & Tile Co.* (1913) 174 Mo. App. 485, 160 S. W. 903, in 3 Law Series, Missouri Bulletin, p. 42.

3. (1895) 62 Mo. App. 66.

4. (1858) 27 Mo. 122.

5. (1894) 57 Mo. App. 25.

6. (1882) 76 Mo. 72, 78, cited in *Donnewald v. Turner Real Estate Co.* (1891) 44 Mo. App. 350.

and nails and braces to the floor and ceiling of the building was sufficient to give the partition with its component parts the character of realty.

The court in its opinion seemed to emphasize the facts that the building was being used only temporarily as a post office, that it was not constructed for a post office; that the post office fixtures were put in the building for the temporary use of the building as a post office; and that such fixtures could be easily removed without injury to the freehold; and that they probably would be so moved when the United States ceased to occupy the premises as a post office. In *Donnewald v. Turner Real Estate Co.*,⁷ it was contended that a boiler and engine placed in the basement by a tenant for use in manufacturing silverware, were not fixtures "because the evidence tended to show that the annexation was for a mere temporary purpose, and not for the permanent and substantial improvement of the building itself," but the court held the annexation sufficient. If this is true where the tenant made the annexation for his own use, it ought to be equally as true when the annexation is made by the owner of the realty for the use of a tenant. It seems immaterial that the building was not originally designed for a post office, inasmuch as the fixtures in question were adapted for its use as such.

The court distinguished this case from *Crane v. Construction Co.*,⁸ *St. Louis Radiator Co. v. Carrol*,⁹ and *Sosmon v. Conlon*, in which the fire hose screwed on to the permanent stand pipe, the stage scenery hung by pulleys and ropes in a theater, and the hot water radiators connected with pipes from a boiler in the basement, were a part of the architectural design of the building. That the article fits into the architectural design is important in determining a fixture only when there is constructive or slight annexation as in *Rogers v. Crow*, and *Sosmon v. Conlon*. In the present case we have actual, physical, and permanent annexation for a permanent purpose; and it seems of little importance that the building was a general store room and could be used for other purposes. If it had been used as a grocery store, the counters and shelves would have become fixtures; if as a saloon, the bar would have passed with the realty; and if as a drug store, the show cases, prescription cases, and shelves would have become fixtures.

It is common for such articles, prepared in the factory, to become a part of the realty, by being placed in and annexed to a general store room similar to this one. The uses to which the store room may be put are many, but the articles adapted to present use become a part

7. (1891) 44 Mo. App. 350, 353, 354.

8. (1906) 121 Mo. App. 209.

9. (1897) 72 Mo. App. 315.

of the building whether it be for a saloon, a drug store, a clothing store, a book store, or a general store room.¹⁰

The fact was emphasized by the court that the United States is the only tenant that will use such fixtures, while fixtures used by one tenant in the drug business may be used by another tenant in the same business. A monopoly does not change the character of the articles used and the probability that an article will be used for a long period does not affect the character of the chattel annexed. The bars placed in a saloon licensed to run for only one year,¹¹ or the prescription cases and shelves placed in a drug store under a lease for one year¹² become fixtures notwithstanding the shortness of the period during which such articles are to be used. Permanency is determined by present facts and not by future probabilities.¹³ And it is of no importance in this case that the articles can be taken out without injury to the freehold, if the building be no longer used as a post office.¹⁴ It seems difficult to justify the principle case on the reasons which controlled previous decisions as to fixtures and the case may be the basis for future decisions that erections by lessors for the benefit of their tenants do not become realty.

ROSCOE E. HARPER

JUDGMENTS—WHEN IS THE SUPREME COURT EQUALLY DIVIDED, AND WHAT IS THE EFFECT? *Faris v. Ewing*¹—An action to try the title to certain land involved the construction of a will. In the trial court, judgment had been given for the defendants. Six judges sat in the case when it was heard by the Supreme Court. Two judges, WALKER and GRAVES, so construed the will that the plaintiff took no interest in the land, and they voted to affirm the judgment of the trial court; two judges, WOODSON and BLAIR, so construed the will that the plaintiff would take a vested fee simple in an undivided half of the land and a contingent remainder in fee in the other undivided half, and they voted to reverse the judgment; two judges, BOND and FARIS, so construed the

10. *Fixtures: Tabor v. Robinson* (N. Y., 1862) 36 Barbour 483 (counters, shelves and drawers); *Connor v. Squires* (1878) 50 Vt. 680 (drawers); *Rinzel v. Stumpf* (1903) 116 Wls. 287, 93 N. W. 36 (counters); *Barringer v. Evenson* (Wis. 1906) 106 N. W. 801 (prescription cases and shelves with glass doors in a drug store); *Woodham v. First National Bank* (Minn., 1892) 50 N. W. 1015 (bar in a saloon); *Smyth v. Sturgis* (1888) 108 N. Y. 495 (a lightly constructed and easily removable partition). *Trade Fixtures: Williams v. Lane* (1895) 62 Mo. App. 66 (shelves in a store room); *McCall v. Walter* (1883) 71 Ga. 287 (shelves and counters) *Roth v. Collins* (1899) 109 Iowa 501, 80 N. W. 543 (shelves and counters set up in sections in building leased for one year as a drug store); *Smusch v. Kohn* (1898) 49 N. Y. S. 176 (bevel glass cabinet partition and show case).

11. *Woodham v. First Nat'l. Bank of Crookston* (1892) 50 N. W. (Minn.) 1015.

12. *Roth v. Collins* (1899) 109 Iowa 501, 80 N. W. 543.

13. *State v. Marshall* (1877) 4 Mo. App. 29.

14. *Thomas v. Davis* (1882) 76 Mo. 72; *State v. Marshall* (1874) 4 Mo. App. 29; *Donnewald v. Turner Real Estate Co.* (1891) 44 Mo. App. 350; *Cohen v. Kyler* (1858) 27 Mo. 122.

1. (1916) 183 S. W. 280.

will that the plaintiff would take a contingent remainder in an undivided half of the land and they too voted for a reversal. In this situation, the court stated that a judgment could not be entered, and "for the purpose of reaching a judgment in this much litigated case" but still adhering to their views as expressed, WALKER and GRAVES, JJ., consented to a judgment that one half of the property be vested in the defendant absolutely and to this extent they concurred with BOND and FARIS, JJ.

This presents an interesting question of the effect of a divided court. If the six judges had divided three to three on whether the judgment of the trial court should be affirmed or reversed, the proper course apart from constitutional restriction would have been to affirm the judgment below.² Such an affirmance is called an "affirmance of necessity."² But the Constitution has prescribed that "when the judges sitting shall be equally divided in opinion, no judgment shall be entered based on such a division," but that "some person learned in the law" shall be called in to assist in a decision.³ If the division in the principal case had been three to three the constitutional provision would have made it incumbent on the court to call in an outsider.⁴ But would the constitutional provision apply if the division among six judges is into three sets of two each? Such a division is quite probable in an action to try title under the statute.⁵ The court would then be equally divided in opinion, but to call in one outsider would not help matters for it could not result in a majority vote for any of the three views. The Constitution does not provide for calling in more than one person for the provision was clearly phrased with reference to a division of the judges into two sets, and the words are, "some person" who is to sit as "one of the judges". But the Constitution forbids the court's entering any judgment in case of equal division, and it is submitted that in such case there is no course open but to dismiss the appeal (possibly without going thru the farce of calling in an outsider) with the result that the judgment of the lower court will stand as the final disposition of the case, tho it should be noted that this is not an affirmance of necessity.

As the court summed up the opinions in *Faris v. Ewing*, the situation would seem to have called for a dismissal of the appeal in accordance with the foregoing; for it was said in the *per curiam* opinion that

2. See *Dubuque v. Illinois Central Railroad Co.* (1874) 39 Iowa 56; *Durant v. Essex County* (1868) 7 Wall. 108. See also William Green, *Stare Decisis*, 14 American Law Review 630. In earlier times, it was the rule that if an appellate court was evenly divided, no judgment could be entered. *Proctor's Case* (1614) 12 Co. 118. The rule is now well settled otherwise. *Gourley v. Insurance Co.* (Mich. 1915) 155 N. W. 483. See 16 Columbia Law Review 352.

3. Constitution of 1875, Art. VI, § 11.

4. In the principal case, one judge who was not sitting might have come to the rescue.

5. Revised Statutes, 1909, § 2535.

two judges had held that the defendant was entitled to all the land in controversy; two that he was entitled to but one half of it; and two that the plaintiff was entitled to all of it. This would seem to be a clear case of equal division, and on this view the judgment of the lower court should not have been reversed. But there is nothing in the report to indicate that the court's attention was directed to the possible application of the constitutional provision.

It seems clear that the effect of the various opinions was not properly stated in the *per curiam* opinion. The first two judges clearly thought that the plaintiff was entitled to none of the land; of the other four, two gave the plaintiff a vested fee in the undivided half devised to the plaintiff's father and two gave her nothing in it, but all the four were agreed that the plaintiff had a contingent remainder in fee in the undivided half previously devised to the defendant's wife. As to this contingent remainder then, there was enough agreement to warrant a judgment. But as to the undivided half previously devised to the plaintiff's father, the first two and the last two judges agreed that the title was in the defendant, so that judgment could be given to this effect. No reason is perceived why the two halves should not be dealt with separately and the judgment should therefore have been that the defendant had good title to the undivided half formerly devised to the plaintiff's father, and that the plaintiff had a contingent remainder in fee to the undivided half formerly devised to the defendant's wife. This seems to have been the court's disposition of the case, tho it is not clear but that the plaintiff and the defendant might in accordance with the *per curiam* opinion each be adjudged to have title to an undivided one-half of the land; it seems difficult to justify the inconclusiveness of the judgment which may call for further litigation. Properly interpreted, the result of the case may be explained without any swerving from the opinions expressed. But the *per curiam* opinion gives appearance to a compromise in that two judges emphasized that their concurrence was solely for the purpose of permitting a judgment. If this were true, it is submitted that the Constitution would have required a different course to be pursued, as outlined above.

MANLEY O. HUDSON

MARRIAGE—REQUISITES OF COMMON LAW MARRIAGE. *State v. Rotter*.¹ *State v. Burkrey*²—In 1881 an act was passed by the Missouri legislature providing that "previous to any marriage in this state, a license for that purpose shall be obtained from the officer herein authorized to issue the same."³ Prior to this act common law marriages were rec-

1. (Mo., 1916) 181 S. W. 1158.

2. (Mo., 1916) 183 S. W. 328.

3. Laws of 1881, p. 161; Revised Statutes 1909, § 8283.

ognized in this state and they continued to be legal after the passage of the act,⁴ since the statute does not declare that common law marriages shall be void.

In general, it seems that any one who may contract a common law marriage may also contract a statutory marriage. There is, however, one exception. The age of consent at common law is twelve and fourteen years respectively for female and male. On arriving at these ages either may enter into a valid common law marriage without the consent of the parent or guardian.⁵ But no male under twenty one years of age or female under eighteen years can procure a license to be married unless he or she has the consent of the parent or guardian.⁶

All that is necessary to constitute a common law marriage is a contract *per verba de praesenti* by which a man and a woman capable in law of consenting agree and consent to take each other as husband and wife, intending that "such contract is then and there to produce the status." Nothing further, such as cohabitation⁷ or solemnization,⁸ is required to consummate the marriage. A contract *per verba de futuro* does not constitute marriage; it is only a contract to marry and requires the relation to be entered into. So if there is a contract of marriage, *per verba de futuro* and cohabitation is had on faith of that contract, the marriage is consummated.⁹

It is necessary to distinguish between the facts which create a common law marriage and those which only raise a presumption of it. Circumstances which ordinarily result from marriage, such as cohabitation, acknowledgment and general reputation that the man and woman living together are husband and wife, raise a rebuttable presumption that the usual cause of these facts, namely marriage, exists, because the law presumes innocence and not guilt.¹⁰ If, however, the reputation is spasmodic, that is, not general in the community where the man and woman resided, or if reputation or cohabitation are lacking, the other facts are too weak to raise a presumption of marriage.¹¹ But when all these facts are present, a presumption of marriage does not always arise. No presumption of common law marriage arises from any relation between a white man and negro woman, because such marriages are by statute illegal and absolutely void.¹² In a prosecution for bigamy or adultery, a common law marriage must be proved in fact, and

4. *State v. Bittick* (1890) 103 Mo. 183, 15 S. W. 325; *Bishop v. Brittain Inv. Co.* (1910) 229 Mo. 669, 129 S. W. 668.

5. *State v. Bittick* (1890) 103 Mo. 183, 15 S. W. 325.

6. Revised Statutes 1909, § 8289.

7. *Davis v. Stouffer* (1908) 132 Mo. App. 555, 112 S. W. 282.

8. *Dyer v. Brannock* (1877) 66 Mo. 391.

9. See *Davis v. Stouffer* (1908) 132 Mo. App. 555, 152 S. W. 282.

10. *Cargile v. Wood* (1876) 63 Mo. 501; *Adair v. Mette* (1900) 156 Mo. 496; 57 S. W. 551; *Imboden v. Trust Co.* (1904) 111 Mo. App. 220, 86 S.

11. *Bishop v. Brittain Inv. Co.* (1910) 229 Mo. 669, 129 S. W. 668.

12. See *Keen v. Keen* (1904) 184 Mo. 358, 83 S. W. 526; Revised Statutes 1909, § 8280.

W. 263; *Plattner v. Plattner* (1905) 116 Mo. App. 405, 91 S. W. 457.

no presumption arises from cohabitation, acknowledgment and reputation tho these facts may be some evidence of marriage.¹³ Furthermore, the common law marriage must be contracted and the cohabitation as man and wife had in a state where such marriages are recognized before it will be considered a valid marriage in this state.¹⁴

State v. Rotter presents a nice question in this connection. In 1902 the prosecuting witness married the defendant and lived with him until 1905 when she discovered that the defendant had a wife by a former marriage still living. The defendant then proposed, "Well, if it is so [referring to the prior marriage] it will be all over with, and you and I will live together as husband and wife." The prosecuting witness assented to this. A few months later the defendant obtained a divorce from his first wife and he thereafter continued to cohabit with the prosecuting witness as her husband for five years. He acknowledged her as his wife and they were reputed to be husband and wife. In 1910, the defendant abandoned her and the prosecution is for this abandonment. The court held that a common law marriage existed between prosecuting witness and defendant: the decision went on the ground that the defendant's proposal was a continuing one and that the prosecuting witness accepted after the divorce. But she did not expressly accept after the divorce and it is hard to find any acceptance at all on her part after the divorce unless the continuance of marriage relations which she had been holding with the defendant constituted an acceptance. But in *Topper v. Perry*,¹⁵ it had been held that mere consent by the woman to hold marriage relations with the man on his assertion that the woman was his wife without any promise on her part to take him as her husband, did not constitute a common law marriage. But the decision in *State v. Rotter* can be sustained on two other grounds. Altho the contract did not create a present status of marriage, it can be regarded as an executory contract to marry or a contract of marriage *per verba de futuro*. The *bona fide* holding of marriage relations by defendant and the prosecuting witness after the divorce was granted, can be regarded as consummating their contract to marry. This is in accord with the holding in *Davis v. Stouffer*.¹⁶ The decision can also be rested on the ground that subsequently to the divorce the defendant and the prosecuting witness cohabitated as husband and wife, they so recognized each other, and they were so reputed. So notwithstanding the invalidity of their prior contract of marriage as a contract *per verba de praesenti*, these latter facts raise

13. *State v. Cooper* (1890) 103 Mo. 266, 15 S. W. 327; *State v. St. John* (1902) 94 Mo. App. 229, 68 S. W. 374.

14. *Jordan v. Telephone Co.* (1908) 136 Mo. App. 192, 116 S. W. 432.

15. (1906) 197 Mo. 531, 95 S. W. 203.

16. (1908) 132 Mo. App. 555, 112 S. W. 282.

a presumption of marriage¹⁷ which does not appear to have been rebutted.

In *State v. Burkrey*, it was held to be "necessary that the contract of common law marriage should be followed by a general and full recognition by each of the other as husband and wife." *Bishop v. Britian Inv. Co.*,¹⁸ cited as sustaining this proposition, does not decide this point for the passage quoted from that case had to do with recognition not as a necessary element in addition to the contract in establishing marriage, but only as an element in raising a presumption of marriage when the actual contract cannot be proved on account of the incompetency of a witness. If nothing more is meant by the word "recognition" than "that by the contract the parties have become and are married for the purpose of assuming and carrying out the marriage relation,"¹⁹ the case is supported by *Davis v. Stouffer*. But if the court means by recognition that there must be acknowledgment and repute, it is submitted that the case is *contra* to *Davis v. Stouffer* and is not sustained by the holding in any other Missouri case.

GARDNER SMITH

17. *Rose v. Clark* (1841) 8 N. Y. Ch. Rep. 578; *Blanchard v. Lambert* 1876) 43 Iowa 228.

18. (1910) 229 Mo. 669, 129 S. W. 668.

19. *Davis v. Stouffer* (1908) 132 Mo. App. 555, 112 S. W. 282; *Carey v. Rulett* (1896) 66 Minn. 327, 69 N. W. 31.

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